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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 327.

A. F. RAWLINGS, RECEIVER OF THE LEE COUNTY NATIONAL BANK, MARIANNA, ARKANSAS, Petitioner,

vs.

MRS. ELLA M. RAY, Respondent.

BRIEF ON BEHALF OF RESPONDENT.

EARL KING,
Attorney for Respondent.

DAGGETT & DAGGETT,
C. E. DAGGETT,
J. B. DAGGETT,
Of Counsel.

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vs.

MRS. ELLA M. RAY, Respondent.

BRIEF ON BEHALF OF RESPONDENT.

I.

OPINIONS OF COURTS BELOW.

The judgment of the District Court and the opinion of the Circuit Court of Appeals are properly in the record, pages 8, 13 to 16.

II.

JURISDICTION.

That jurisdiction exists in this Court is admitted.

III.

SUMMARY STATEMENT.

The facts are correctly stated in petitioner's brief.

IV.

SPECIFICATION OF ERRORS.

Petitioner's brief properly states the errors for review.

V.

THE SOLE AND ONLY QUESTION PRESENTED IN THIS CASE IS:

(a) Does the three year statute of limitations of the State of Arkansas begin to run from the date the comptroller levied the assessment, or,

(b) From the date of payment thereof as fixed by the comptroller? If (a) applies then the cause of action is barred. If (b) applies then the complaint was filed within the statutory period.

VI.

STATUTES INVOLVED.

Petitioner's brief correctly states the statutes involved herein.

VII.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

We must take issue with petitioner here.

(a) It is admitted that the ruling of the Circuit Court of Appeals in the instant case conflicts with the decisions of other Courts of Appeal, but we ask the Court to bear

in mind that a decision in this case would be applicable only to cases arising within the State of Arkansas for the reason that the Arkansas statute of limitations is applicable and the decision herein would not be authority in a case involving the construction of statutes of limitation of other states.

(b) The question presented in the instant case is purely local. This Court should take judicial knowledge of the fact that the bank involved in this litigation is the only national bank in the State of Arkansas now in process of liquidation. Moreover, liability imposed under the statute under consideration herein has been removed by the act of June 16, 1933, Chapter 89, Sec. 22, from which we quote as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937."
> See U. S. C. A. Title 12, Section 64a.

Therefore, a decision in this case will have no application whatever in the administration of the affairs of other banks.

(c) The decision of this Court in the instant case does not involve an important question of law for the reasons stated in Paragraph (b). Furthermore, the question involved in this case has been definitely settled by this Court in the case of Pufahl v. Estate of Parks (1936), 299 U. S. 217.

VIII.

SUMMARY OF ARGUMENT.

The right to institute the suit herein arose and the cause of action under the Arkansas Statute of Limitations accrued November 6, 1935, the date the comptroller levied the assessment. Suit was filed December 7, 1938. Therefore, the cause of action against respondent was barred by the Arkansas three year Statute of Limitations.

(1) The character of the assessment liability is measured by the Federal Statute.

(2) The law of the State of Arkansas fixes the time at which the Statute of Limitations will commence to run.

(3) The Federal Statute creates, to quote the language of this Court in Pufahl vs. Estate of Parks, 299 U. S. 217, 57 Sup. Ct. Rep. 151:

> "From the moment of the comptroller's order for assessment, the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

In other words, a debt "due on demand" and under the laws of Arkansas as hereinafter cited the Statute of Limitations begins to run against such a claim from the date of its making.

(4) We contend that the ruling of the Court below is in accord with the previous decisions of this Court.

ARKANSAS DECISIONS.

If, as is shown by the cases cited above, and by those cited by the petitioner as well, the liability created by the Federal Statute is "due on demand," then this case is ruled by the decision of the Supreme Court of Arkansas in the case of Sturdivant vs. McCorley, 83 Ark., page 278, 103 S. W. 132:

> "A debt payable on demand is due immediately, so that an action can be brought at any time without any other demand, then the suit and the Statute of Limitations begins to run at once."

To the same effect are Kempner vs. Gans, 87 Ark. 221, 111 S. W. 1123, and McCollums vs. Neimeyer, 142 Ark. 471, 219 S. W. 746.

IX.

ARGUMENT.

The right to institute this suit arose and the cause of action accrued on November 6, 1935, the date the comptroller made the assessment. Suit was not filed until December 7, 1938, more than three years after the date the assessment was levied by the comptroller; therefore the cause of action is barred by the Arkansas three year statute of limitations.

In support of the above propositions we desire to present to this Court the following statements of law, to-wit:

(1) The character of the liability must be measured by the language of the Federal Statute.

(2) Such liability must be enforced according to the laws of the State of Arkansas.

(3) The liability is one due and payable "on demand" and the right to sue upon such a cause of action in the State of Arkansas begins to run upon its making. Therefore, the cause of action in the instant case was barred when the complaint in the instant suit was filed.

Petitioner cites the opinion of this Court in Forrest vs. Jack (1935), 294 U. S. 158-172. We dismiss any further reference to this case by the following quotation from the opinion:

> "No cause of action arises until the assessment is made by the comptroller and so far as concerns the need and amount, his findings are conclusive."

The opinion of the Court cites numerous cases from this Court, many of which are cited by petitioner in support of their position herein, but all of the cases bear out the above fundamental statement of the law and if such holding be adhered to in the instant case it necessarily follows that the decision of the lower Court herein should be affirmed. That such is a proper interpretation of the opinion is further supported by the opinion of this Court in the case of Pufahl vs. Parks Estate, 299 U. S. 217 (Dec. 7, 1936), from which we quote:

> "From the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt in common law against a living stockholder."

Strasberger vs. Schram (Nov. 23, 1937), 93 F. (2), page 246, was a case arising in the District of Columbia brought by Schram, the receiver of the First National Bank of Detroit, a Michigan bank, against Strasberger, a resident of the District of Columbia, to collect an assessment

on the capital stock of the bank owned by Strasberger. Receiver appointed May 11, 1933. Comptroller levied assessment May 16th payable on or before the 23rd day of June, 1933, which date of payment was extended to July 31st, 1933. Strasberger filed motion to dismiss September 25, 1936, pleading the Statute of Limitations, and this is the only question submitted to the Court. We quote from the opinion as follows:

> "It is also agreed that the applicable statute is that of the District of Columbia so that the case as presented involves the single question whether the cause of action accrued upon the declaration by the comptroller of the deficiency or whether it accrued on the final date set by the comptroller for payment."

The position of the appellant was that the cause of action accrued on the date the comptroller declared the deficiency and fixed the amount to be paid by the shareholders. The position of the receiver was that the right to maintain the action did not accrue until the final date set by the comptroller for payment of the assessment. The suit was filed July 22, 1936. The date of the assessment was May 16, 1933. Therefore, if the cause of action accrued at the date of the comptroller's assessment then the action was barred. If it accrued at the date of the payment fixed by the comptroller, then the statute had not run. The Court then reviews the case of McDonald vs. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437, in which the assessment was made June 10, 1893, and the date of payment fixed on July 10, 1893. Suit by the receiver was brought in May, 1898. The Court, in the opinion in the McDonald case, uses the following language:

> "As the cause of action in this case accrued on July 10, 1893, when the assessment was made payable and the action was begun on June 20, 1898, more than four, but less than five years thereafter, the case really turns upon the question whether the action is upon a 'contract or promise in writing' or 'upon a contract not in writing express or implied' or 'upon a liability created by statute'."

The Court in the Strasberger case does not rest its opinion upon the language of this Court above quoted, for they say, further:

> "It is apparent that it was wholly immaterial in that case whether the cause of action accrued on June 10, or July 10, since the court was dealing in years and not days."

However, the Court in this opinion does use this language:

> "That principle is, we believe, that until an unconditional liability to pay something is fastened on a debtor no action can be maintained against him and the statute of limitations does not begin to run in his favor,"

and cites Scovill vs. Thayer, 195 U. S. 143, in support of its statement.

An analysis of the opinion of this Court in Scovill v. Thayer clearly discloses that the opinion does not apply to the facts in the case at bar. Scovill vs. Thayer was a suit by the receiver of an insolvent business corporation organized under the laws of the State of Kansas. The corporation was adjudicated bankrupt on an insolvency petition, and the assignee brought suit against the stockholders to recover their unpaid stock subscriptions. The

question in that case was whether or not the Statute of Limitations began to run from the date the Court rendered its decree ordering the assessment or from the date of the bankruptcy of the corporation. No question of the National Bank statute is involved whatever, and in fact, no federal statute of any kind was under consideration by the Court in that case. When these cases are analyzed it will be clearly seen that no case from this Court has been cited by the Court in Strasberger vs. Schram upholding its opinion. It is noted here also that this opinion makes us reference to the case of Pufahl vs. Parks Estate from this Court.

The Court also cites Thompson vs. German Insurance Company, November 24, 1896, 76 Fed. 892.

A study of this opinion shows that nothing therein is authority for the position taken in the Strasberger case. The findings of the Court in that case may be briefly stated as follows:

1. The Circuit Court has jurisdiction.

2. The Statute of Limitations can bar an action on a stock assessment.

3. The statute applies in equity as well as at law.

4. "The act of the comptroller in making the assessment created a right of action against the stockholders, but it was not the institution of a suit for the enforcement of the right of action that is called into being . . . as soon as this right of action accrued to the receivers the statute of limitations began to run in favor of the stockholders, and the full period to complete the bar had terminated before this suit was brought."

If, as this opinion states, "The act of the comptroller in making the assessment created a right of action against the stockholders" then under the applicable statute of the State of Arkansas, the statute begins to run and no power exists in the comptroller to rule otherwise.

Moreover: The facts here were: The assessment was made July 13, 1892, payable August 3, 1893. "The bill was filed on the fifth day of October, 1896, more than four years after the assessment was made, and after the amount thereof was determined to be due and payable."

Rankin v. Miller, 207 Fed. 602 (District Court). Suit by Rankin as Receiver First National Bank of Alma, Kansas, against Executors of Robert H. Miller. The same litigation was before the District Court in the cases of Hamner v. Miller, 263 Fed. 956, and Rankin v. Miller, 266 Fed. 236. The lower Court overruled the plea of the statute of limitations and on appeal under the style of Miller v. Hamner, 269 Fed. 891, the Circuit Court of Appeals (3d Circuit) reversed and held that the statute of limitations barred the action.

In Rankin v. Barton, 199 U. S. 228, 26 Sup. Ct. Rep. 29, the second assessment was levied November 20, 1900. Plea of Statute of Limitations sustained by the State Court. The Court says:

> "The individual liability of a stockholder can only be enforced by his (Comptroller's) order. The provisions are as much for the benefit of the stockholder as for the United States and it is indispensable to the beginning of a suit against the stockholder. In other words, the liability dates from the order of the Comptroller."

We think we would be perfectly logical to state here that the words "from the order of the Comptroller" mean that the statute begins to run on the date of the order of the Comptroller (in the case at bar November 6, 1935).

Hall v. Ballard, 90 Fed. (2) 939, Bank in voluntary liquidation, not upon order of the Comptroller. Receiver appointed by and acting under Court order. The statute of limitations not set in motion until order of Court declaring insolvency and levying assessment. We quote from the opinion:

> "Therefore, the cause of action against appellee here never accrued until July 7, 1934, the date upon which the U. S. District Court for the Western Division of Virginia first ascertained the necessity and ordered the payment of 100% of the par value of the stock."

The same statements apply to the case of King v. Pomeroy, 121 Fed. 286-292, 58 C.C.A. 209. We quote:

> "The liability of the shareholders of the bank does not become due, does not mature, and the action to collect it does not accrue, until the court decides that it is necessary to collect some part of it, determine the amount and fixes the time for its payment."

In these cases, if the Court will substitute the action of the Comptroller in levying the assessment for the decree of the Court, they become authority supporting the decision of the lower Court herein.

Moreover, the learned justice who wrote the opinion in the Strasberger case lays great stress on the practice of the comptroller in levying the assessment and fixing

a later date for its payment. Reliance on such practice according to all the decisions of this Court is warranted only when doubt or ambiguity exists in the language of the statute. Such is not the case here. No effort was made by Congress to fix the date of payment of the assessment. The statute fixes the liability only and the statute of limitations of the state then begins to operate and the action of the Comptroller if approved would give to him power as was pointed out in the case of Coffey v. Fisher (hereinafter quoted) to suspend or forever annul the statute of a sovereign state. The mere statement of the proposition itself shows the fallacy of such argument. The facts in the case at bar makes applicable the following quotation from the case of Texas and Pacific Railway Company v. U. S., 289 U. S. 627, 53 Sup. Ct. 768:

> "Interpretation of act by statutory body plainly not granted such power is not binding in the courts."

Also, the learned justice attempts to distinguish the case from the case of Johnson v. Green (C.C.A. 9th Mar. 1, 1937 hereinafter cited), by drawing a distinction between the language of the California statute "Within three years after . . . the liability was created" as opposed to the language of the District of Columbia statute, which reads: "After three years from the time when the right to maintain such action shall have accrued."

We submit that this is a distinction without a difference. To say that the state statute of limitation has anything to do with "Creating" the liability is extremely illogical. The federal statute "creates" the right and fixes its character and same cannot be modified or changed by the state statute and if the obligation created

by the federal statute is one due "on demand" (as all the cases hold) it becomes wholly immaterial when the liability is "created" or "accrues." The Twentieth Century Dictionary defines the word "creates" as "to produce; to bring into being from nothing; to cause to exist" and the word "accrue" is defined as "to proceed, or come; to be added."

We call the Court's attention to the following authorities in support of the decision of the lower Court herein:

Michie on Banks & Banking, Vol. 7, page 110, Sec. 116:

> "Since the statutory liability of shareholders in a National Bank is conditional the statute of limitations does not commence to run until after the assessment has been made by the Comptroller of the currency."

The author cites McDonald v. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. 437.

Petitioner quotes from this case certain language which might be construed as favorable to his contention; likewise we say that the following language, from the same opinion, bears out our contention:

> "In such cases (insolvency under Sec. 5234) no debt becomes due to the receiver, as such, until a deficiency has been ascertained and an assessment made, when the statute begins to run."

The author also cites McClain v. Rankin, 197 U. S. 154, 25 Sup. Ct. 410, from which petitioner quotes. We also indulge ourselves in a quotation from the same case (page 413) as follows:

"In Carrol v. Green it was said: 'According to the statute, the liability of each stockholder arose upon the failure of the bank. The liability gave at once the right to sue; and, by necessary consequences, the period of limitation began at the same time. But here (as in the case at bar) the right to sue did not obtain until the Comptroller of the Currency had acted, and his order was the basis of the suit. The statute of limitation did not commence to run, **until assessment made**, and then it ran as against an action to enforce the statutory liability, and not an action for breach of contract.'"

So far as we are able to ascertain the question presented here was first presented to the Courts in the case of Armstrong vs. McAdams (Jan. 5, 1931—8th) 46 Fed. (2) page 931. Two questions were presented to the Court in that case:

(1) When does the statute begin to run?

(2) Does the three year or the five year Arkansas Statute apply?

The Court held that the five year statute applied. Afterwards however the same question was presented to the Supreme Court of Arkansas in the case of Vandover vs. Lumber Underwriters et al., 126 S.W. (2) 105, and that Court held that the three year statute governed such liabilities. Thereupon in the case of Futrall vs. Branson, 104 Fed. (2) 409, the Circuit Court of Appeals for the Eighth Circuit reversed its holdings in Armstrong vs. McAdams and followed the decision of the Supreme Court of Arkansas in the Vandover case. We quote from the opinion in the McAdams case:

"The cause of action accrued August 10, 1926, the date the assessment was made by the comptroller of the currency."

It is not clear from the above statement whether August 10 was the date the assessment was made payable or the date it was levied by the comptroller. At the hearing in the Court below the original record was examined and it was found that August 10th was the date the assessment was levied and not the date fixed for its payment.

See opinion of lower Court (R. page 14).

In Drain v. Stough, (9th) 61 Fed. (2) page 668 (March 7, 1932), the Circuit Court of Appeals for the Ninth Circuit says:

"The date of the assessment is the date upon which the liability of the stockholder to the receiver accrues and not until the assessment is made and then only does the statute of limitations begin to run."

It is worthy of note here that the Court cites as authority for the above statement the cases of Scovill v. Thayer, Supra, and McDonald v. Thompson, Supra, both of which are cited in the Strasberger case in support of an entirely different statement of the law.

In Donald v. Byrd, (9th) 85 Fed. (2) 663 (Sept. 8, 1936):

"As regards running of limitations, causes of action accrued against stockholders of national banking association when assessments are made by comptroller of the currency."

This opinion in support of its statement cites practically all the cases cited in petitioner's brief and reviews many of the authorities.

In Pufahl vs. Parks Estate, 299 U. S. page 175 (December 7, 1936), this Court establishes the character of the claim of the comptroller, the date of its accrual or, if the petitioner herein deems it better language, the date of its creation, in the following language:

> "From the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

The opinion is quite lengthy, the statute of limitations of the State of Illinois was involved, and the principles laid down therein had served to clarify many conflicting decisions of the various lower courts, and to quote the opinion of Judge Gardner in the case at bar the "question has been definitely put to test by the decision of the Supreme Court." (R. page 15.) It is worthy of note here that in the Strasberger case no reference is made to this opinion.

Johnson v. Greene, (9th) 88 Fed. (2) 683 (Mar. 1, 1937), action to recover statutory assessment against national bank stockholders brought more than three years after date of assessment but less than three years after date when assessment was payable were barred by the California statute requiring bringing of actions on statutory liability within three years after creation thereof.

In Coffey v. Fisher, (6th) 100 Fed. (2) 51 (Nov. 16, 1938), the Circuit Court of Appeals for the Sixth Circuit, the syllabus is as follows:

> "The right of action to enforce statutory liability of national bank stockholder accrued . . . **when assessment was made**, rather than on last extension date allowed by Comptroller for payment, and the statute was not tolled by extensions of time for payment."

In this case the Court reviews the decisions of this Court, other Appellate Courts and states the law as follows:

> "Plaintiff insists that his cause of action accrued on April 15, 1938, the last extension date allowed by the comptroller and upon the theory that Section 8608 is applicable he had 18 months thereafter within which to sue. We recognize that there are decisions supporting his contention but the last pronouncement of the Supreme Court is to the contrary."

In Pufahl v. Estate of Parks, Supra, the Court said:

> "The contingent obligation to pay an assessment is rendered absolute by the comptroller's action in ordering one . . . from the moment of the comptroller's order for assessment the bank's receiver has a claim which would support an action of debt at common law against a living stockholder."

X.

CONCLUSION.

In view of the foregoing, we submit the following proposition as the law of the case:

(a) The question herein is one of local law, can never arise again, because of the change in the federal statute under consideration and the writ of certiorari should be dismissed as improvidently granted.

(b) The statute creates a liability on the stockholder for the par value of his stock, contingent on the insolvency of the bank, and when such contingency arises, the liability becomes absolute, payable "on demand." In other words, the statute creates a "demand liability."

(c) The liability must be enforced according to the laws of the State of Arkansas; and under the Arkansas statute of limitations and the decisions of the Supreme Court of Arkansas, the cause of action was barred when the complaint was filed.

(d) The decision of the lower Court is in complete accord with prior decisions of this Court.

The decision of the lower Court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 327.—October Term, 1940.

A. F. Rawlings, Receiver of the Lee County National Bank, Marianna, Arkansas, Petitioner,
vs.
Mrs. Ella M. Ray.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 3, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner is the receiver of the Lee County National Bank of Marianna, Arkansas, which in 1933 was declared by the Comptroller of the Currency to be insolvent. On November 6, 1935, the Comptroller assessed its shareholders fifty per centum of the par value of their shares. The assessment was required to be paid on or before December 13, 1935, and the receiver gave notice accordingly. As respondent failed to pay, the receiver brought suit on December 7, 1938, in the District Court of the United States for the Eastern District of Arkansas to recover the amount assessed. Respondent pleaded the Arkansas statute of limitations which provides that such an action must be commenced "within three years after the cause of action shall accrue". Pope's Digest of Statutes of Arkansas (1937), Sec. 8928. The District Court sustained the plea and its judgment was affirmed by the Circuit Court of Appeals. 111 F. (2d) 695. Because of a conflict of decisions we granted certiorari. See *Strasburger* v. *Schram*, Ct. App. D. C., 93 F. (2d) 246; *Reich* v. *Van Dyke*, C. C. A. 3d, 107 F. (2d) 682; *Haight* v. *First Trust & Deposit Co.*, C. C. A. 2d, 112 F. (2d) 572; *MacPherson* v. *Schram*, C. C. A. 5th, 112 F. (2d) 674.

The state statute of limitations is applicable. *McDonald* v. *Thompson*, 184 U. S. 71, 72; *McClaine* v. *Rankin*, 197 U. S. 154, 158. The question is whether the statute began to run on the date of the assessment, as held by the court below, or on the date fixed for payment. The words "after the cause of action shall accrue" in the Arkansas statute have their usual meaning and refer to "a com-

plete and present cause of action". *Holloway* v. *Morris,* 182 Ark. 1096, 1099.

The question as to the time when there was a complete and present cause of action so that the receiver could enforce by suit the liability imposed by the Comptroller's assessment is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation.

While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. Respondent was allowed until that date to pay and prior thereto suit could not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935, and the suit was in time.

The case of *Pufahl* v. *Estate of Parks,* 299 U. S. 217 (upon which the court below relied) is not to the contrary. The question now presented was not there involved. In that case, after the death of a stockholder of a national bank, and after the expiration of one year from the date of letters testamentary, the Comptroller of the Currency made an assessment upon the decedent's estate. The state court, applying a state statute, had disallowed the receiver's claim upon the assessment as against undistributed assets in the hands of the executors, which had been inventoried within a year from the date of letters testamentary, because the claim did not accrue and was not presented to the probate court within that period, but allowed the claim as to assets not inventoried within the year. We affirmed the judgment. We said that where an assessment had been made in the decedent's lifetime an accrued and provable debt existed against his estate, and that if the assessment were made after his death a claim against the funds and assets of the estate accrued as of the date of the assessment. Further, that the claim of the receiver, although based upon a federal statute, could be enforced only in conformity with the law of the forum governing the recovery of debts of like nature (*Id., pp.* 224, 225) and that the non-discriminatory legislation of Illinois where the suit was brought was controlling. We observed that the contingent obligation of a stockholder to pay an assessment was rendered absolute by the Comptroller's action in ordering one and that from the moment of the order of assessment the receiver had a claim which would support an action at common law against a living